

STATE OF MICHIGAN
COURT OF APPEALS

ROGER MILLS,

Plaintiff-Appellant,

v

SEAN COMBS, a/k/a, PUFF DADDY, a/k/a
SEAN PUFFY COMBS, a/k/a PUFFY COMBS,
RON GILYARD, and BAD BOY
ENTERTAINMENT, INC., d/b/a BAD BOY
RECORDS,

Defendants-Appellees,

and

LISA SPIRITUS, DAN KLORES ASSOCIATES,
INC., and WCHB, a/k/a FM 105.9,

Defendants.

Before: Zahra, P.J., and Cavanagh and Owens, JJ.

PER CURIAM.

Plaintiff appeals as of right from a judgment of no cause of action in favor of defendants Gilyard and Bad Boy Entertainment, Inc., which was entered following a jury trial. On appeal, plaintiff argues that the trial court erroneously excluded a tape recording of a telephone conversation between plaintiff and Ron Gilyard, which plaintiff alleges contributed to the trial court's decision to grant a directed verdict in favor of defendant Sean Combs. We affirm. This case is being decided without oral argument pursuant to MCR 7.214(E).

The trial court excluded the tape recording on the basis of its determination that the recording was not properly authenticated under MRE 901. The decision whether an item has been properly authenticated is a matter within the sound discretion of the trial court. *People v Ford*, 262 Mich App 443, 460; 687 NW2d 119 (2004). This Court will find an abuse of discretion only if an unprejudiced person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *Id.*

MRE 901 provides:

(a) General Provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

* * *

(6) *Telephone Conversations*. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (A) in the case of a person, circumstances, including self-identification, show the person answering to be the one called. . . .

Under MRE 901, a tape recording of a telephone conversation may be authenticated merely by having a knowledgeable witness identify the voices on the tape; the rule requires no more. *People v Berkey*, 437 Mich 40, 50; 467 NW2d 6 (1991).

In this case, plaintiff testified that he had a telephone conversation with Gilyard, which he recorded with a mini-cassette player, and that the tape recording that he sought to admit at trial was the recording of his conversation with Gilyard. Plaintiff testified that he recognized Gilyard's voice on the telephone from a previous encounter he had with Gilyard, and that the person on the other end of the telephone conversation also identified himself as Gilyard. Plaintiff stated that the tape recording was not edited in any way, that he stored the tape recording after making it, and that he had retained possession of the recording since making it, except for giving it to his attorney to make a copy.

The trial court apparently believed that the tape recording was not authenticated under MRE 901(b)(6) because Gilyard was not the original party who plaintiff spoke to on the telephone and the telephone number that plaintiff dialed was not assigned to Gilyard. Under MRE 901(b), however, evidence sufficient to support a finding that the matter in question is what its proponent claims is all that is required for authentication. The example in subrule (b)(6) is only one nonexclusive means of authentication. Here, plaintiff's testimony that he recognized Gilyard's voice and that the other person identified himself as Gilyard was sufficient to establish that the recording was what plaintiff claimed it to be, i.e., a telephone conversation between plaintiff and Gilyard. Therefore, the trial court abused its discretion in refusing to admit this evidence.

Nonetheless, the error was harmless. Plaintiff desired to admit the recording to establish defendant Combs' vicarious liability for the alleged assault on plaintiff. In the recorded conversation, Gilyard stated that Combs had directed Gilyard to "get the tape." But even if true, this doesn't establish that Combs gave any instruction to the bodyguard, who was the person who allegedly assaulted plaintiff. Further, as the trial court observed, a directive to "get the tape" does not imply that Combs authorized an assault. More importantly, the jury returned a verdict of no cause of action in favor of defendants Gilyard and Bad Boy Entertainment, finding that no assault and battery ever occurred, which necessarily vitiated any vicarious liability by Combs.

For these reasons, the trial court's error in excluding the evidence of the tape recording was harmless.

Affirmed.

/s/ Brian K. Zahra
/s/ Mark J. Cavanagh
/s/ Donald S. Owens